Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2071

FRED C. SCOTT,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LOMBARD & CATES
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June 27, 1980

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

FRED C. SCOTT,

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versus

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, as yet unreported, appears at Appendix B, infra, p. 3a. The opinion of the United States District Court for the Eastern District of Louisiana is unreported and appears at Appendix A, infra, pp. 1a-2a. The United States Court of Appeals

affirmed the judgment of the United States District Court for the Eastern District of Louisiana.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 30, 1980, see Appendix C, infra, pp. 5a-6a. The petition for certiorari was filed less than 30 days from the dates aforesaid. The jurisdiction of this Honorable Court is invoked pursuant to Title 28, Section 1254 of the United States code.

QUESTIONS PRESENTED

1. Whether the action of the United States District Court and the Court of Appeals in allowing the government to play before the jury, without establishing a proper foundation, tape recorded conversations which allegedly occurred between the petitioner and a confidential informant of the government constitutes a violation of the Due Process Clause of the Fourteenth Amendment.

2. Whether the trial court acted in a manner violative of petitioner's right to Due Process as set forth in the Fourteenth Amendment to the United States Constitution in denying the defense motion for a continuance after the government's failure to fully disclose the scientific report of its chemist pursuant to Rule 16 of the Federal Rules of Criminal Procedure.

3. Whether the court erred in forcing a juror to serve in spite of medical disabilities and rather than dismissing the juror and utilizing the alternate, rendering fair and impartial service impossible.

4. Whether the trial court erred in failing to grant the motion of the defense for a directed verdict upon the government's failure to establish and prove all of the elements charged in Counts V and VI Indictment by the Grand Jury, rendering the trial a mere farce and mockery in contravention of the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, §1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added)

Constitution of the United States, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property without due process of law;* nor shall private property be taken for public use, without just compensation. (Emphasis added)

STATEMENT OF FACTS

On April 12, 1979, Fred C. Scott, hereinafter petitioner, was indicted in a seven (7) count indictment by the Grand Jury for the Eastern District of Louisiana. In the indictment, petitioner was charged with violation of Title 18, Section 922(h), (i) and Title 21, Section 841(a), (b) and 843(b) of the United States Code. Specifically, petitioner was charged with knowingly or intentionally manufacturing, distributing, or dispensing a controlled substance, and "knowingly and intentionally using a communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony . . . . ." (18 USCA 843(b)).

At the arraignment on April 23, 1979, petitioner pled not guilty on each of the seven (7) counts of the Indictment.

On July 7, 1979, petitioner's trial by jury commenced in the United States District Court for the

Eastern District of Louisiana. On July 10, the jury returned a verdict of guilty on Counts I through VI.

Petitioner appealed this judgment of conviction to the United States Court of Appeals for the Fifth Circuit on September 14, 1979. This judgment of conviction was affirmed.

At issue is the fact that during the preliminary stage of the proceeding, a prospective juror, Mrs. Mary McDowell, revealed the fact that she suffered from rheumatoid arthritis and would have problems if the trial went on into the night. Any doubts with regard thereto were removed by the statement of the trial Judge that the proceedings were *expected* to recess at approximately 5:00 p.m. or 5:30 p.m. in the evenings. (TT 8) After such appeasement, neither Mrs. McDowell nor either attorney made any further comments on the matter.

However, during the proceedings of July 11, 1979, it was revealed that Mrs. McDowell's arthritic condition was aggravated and the juror was in pain. The Court and the Government only acknowledged the fact that the juror was in pain, but doubted that the pain would have any effect on her ability to serve. (TT 304, 305)

Also at issue is the fact that the defense at no time had access to notes regarding testing and reporting as conducted by the Chemist of the government relative to the isomers of Cocaine. In spite of the Govern-

ment's reference to open file discovery, the information was not made available to the defense. At the urgence of Dr. Robert Shapiro, the defense's expert witness, the work notes of the government Chemist were requested to facilitate a continuance. This motion was denied. This was done in direct contravention of Rule 16 of the Federal Rules of Criminal Procedure which requires the disclosure of items of physical or documentary evidence in the possession of the government.

During the trial on the merits, the court allowed the admission into evidence of a tape recorded conversation, allegedly occurring between the petitioner and a confidential informant, before a proper foundation was in fact laid. No evidentiary hearing was held, nor was the recording tested under any formulistic guidelines set forth by the court. Certain important principles or facts must be established *before* the introduction of the tape recording into evidence.

In Counts V and VI of the Indictment by the grand jury the defendant was charged with knowingly and intentionally using a communication facility in committing or facilitating the commission of a felony. However, the term felony was never defined for the benefit of the jury charged with making a decision as to the guilt or innocence of the petitioner herein.

REASONS FOR GRANTING THE WRIT

The above actions of the United States District Court for the Eastern District of Louisiana and the

United States Court of Appeals for the Fifth Circuit are in direct contravention of the Due Process Clauses of the Fifth and Fourteenth Amendments. The United States Constitution, Amendment V and the same's applicability to actions of the state, confers upon citizens of the United States the assurance of due process of law where there is the possibility of deprivation of life, liberty, or property. The clause mandates that each defendant receive a fair trial. Although the government has an obligation to prosecute each case zealously, the government's primary obligation is to try each case fairly and with due regard for the accused's rights. *U.S. v. Carter,* 556 F.2d 1264 (C.A. Fla. 1978).

With regard to the instant controversy relevant to a proper foundation before introducing the tape recorded conversation, there in fact are certain guidelines to be followed as well as the probable necessity of a prior hearing, *O. S. v. Greenfield,* 574 F.2d 305. Matters such as intelligibility, accuracy of transcripts and opportunity to contest are relevant.

The burden of proof here is of necessity on the government, which moves for the entry into evidence. *U.S. v. Biggins,* 551 F.2d 64 (1977). It is submitted, that at this point (subsequent to a hearing and proper foundation) judicial discretion is concerned, and not before.

To be answered are questions concerning:

1. competency of the operator;

2. fidelity of the recording equipment;

3. absence of deletion, additions, or alterations in relevant portion;

4. identification of relevant speakers, *U.S. v. Cuestra*, 597 F.2d 903 (1979).

In this matter, the relevant party could not answer the above questions, and had no control over the recordation.

Pursuant to Rule 16 of the Federal Rules of Criminal Procedure, items of physical or documentary evidence in the possession of the government must be disclosed. *U.S. v. Joyner*, 494 F.2d 501 (1974). In the instant matter, such evidence as the Chemist's notes was shielded by the government, and upon its revelation, the court refused to grant a continuance. Such a refusal is a direct denial of due process of law, in contravention of the Fifth Amendment of the U.S. Constitution. Absent the continuance, it was virtually impossible to prepare a cross examination of the government's Chemist. Hoarding of evidence, or "trial by ambush" was expressly repudiated by the Fifth Circuit in *U.S. v. O'Shea*, 450 F.2d 298 (5th Cir., 1971). However, immediately upon cognizance of the Chemist's notes, the defense made a timely motion for continuance, which it is submitted, was unjustly denied by the trial court. Thus, the judgment of conviction should be reversed, or a new trial granted.

It is respectfully submitted that further error was committed in not discharging a juror who was disabled

due to a rheumatoid arthritic condition, rendering fair and impartial service impossible Such action must of necessity be categorized as an abuse of judicial discretion. *U.S. v. Brown,* 591 F.2d 980 (5th Cir. 1978). Upon discovery of the aggravated condition of Mrs. McDowell, the juror, a more thorough inquiry should have been made to determine whether the juror was actually capable of continuing to serve. *U.S. v. Allen,* 588 F.2d 1100 (5th Cir., 1979). The aggravated nature of the juror's condition was made manifest only subsequent to the jury being empaneled and the objection was raised as near in proximity as possible.

Further, the government failed to prove an essential element of Counts V and VI, by definition leaving a degree of reasonable doubt in the minds of jurors. The government completely ignored proving the necessary classification and definition of "felony" with respect to Counts V and VI of the Indictment. In multi-count Indictment the government is required to prove each element and fact relevant to the separate and individual charges of the indictment, *U.S. v. Horsley,* 519 F.2d 1264 (5th Cir., 1975); *U.S. v. Costello,* 483 F.2d 1366 (5th Cir., 1973). The government therefore failed to carry its burden of proof on these two counts. Felony action, an essential element of the charge, "knowingly and intentionally using a communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony. . ." was not touched upon by the government with respect to Counts V and VI. Since each element of the charges of these counts was

not proven beyond a reasonable doubt, petitioner is entitled to a judgment of acquittal or a new trial.

CONCLUSION

Because of the above enumerated actions by the trial court, the United States District Court for the Eastern District of Louisiana, petitioner, Fred C. Scott, has been denied Due Process of Law as guaranteed by the United States *Constitution*, Amendments V and XIV, and is therefore entitled to a reversal of the judgment below, or, in the alternative, a new trial.

Respectfully submitted,

HARRIS, STAMPLEY, McKEE,
LOMBARD & CATES

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New Orleans, Louisiana 70112
Telephone (504) 561-5831

CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing petition were served on Wade H. McCree, Solicitor General of the United States, Department of Justice, Washington, DC 20530; one copy has been served on Fredericka L. Homberg, Assistant U.S. Attorney, 500 Camp Street, Hale Boggs Building, New Orleans, LA 70130, by depositing in the U.S. mails with adequate postage affixed thereto. All parties required to be served have been served.

New Orleans, Louisiana, June ____, 1980.

ARTHUR L. HARRIS, SR.

APPENDIX A

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF LOUISIANA

Docket No. 79-175C

THE UNITED STATES OF AMERICA

versus

FRED C. SCOTT

JUDGMENT AND PROBATION COMMITMENT ORDER

FILED: September 5, 1979

In the presence of the attorney for the government the defendant appeared in person on September 5, 1979 with counsel ARTHUR HARRIS, Esq.

There being a verdict of GUILTY to counts 1-6, on July 11, 1979.

Defendant has been convicted as charged of the offenses of: Violation of Titles 21 USC 841(a)(1); 21 USC 843(b), INDICTMENT FOR VIOLATION OF THE FEDERAL CONTROLLED SUBSTANCES ACT OF 1970.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Six (6) years as to Count 1 with three (3) years special parole to follow. Six (6) years on each count #2, count 3 and count 4, with three (3) years special parole. These counts to run concurrently with each other and with count 1. Four (4) years on each count; Count 5 and Count 6. ORDERED to run concurrently with each other and concurrently with sentence imposed in counts 2, 3 and 4.

IT IS ORDERED that defendant is to report to the U.S. Marshal on Friday, October 5, 1979 at 12:00 noon.

/s/ ROBERT F. COLLINS
ROBERT F. COLLINS
U.S. DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5545
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRED C. SCOTT,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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April 1, 1980

Before GEE, RUBIN and POLITZ, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Fed.R.App.P. 34(a); 5th Cir. R. 18.

1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OFFICE OF THE CLERK

April 30, 1980

TO ALL PARTIES LISTED BELOW:

NO. 79-5545 UNITED STATES OF AMERICA -vs-
FRED C. SCOTT
(CR-79-175 "C")

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly Yours,

GILBERT F. GANUCHEAU,
Clerk

/s/ P. KELLER
Deputy Clerk

cc: Mr. Arthur L. Harris, Sr.
Mr. John Volz
Ms. Fredericka L. Homberg

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5545

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRED C. SCOTT,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

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Filed: May 19, 1980

ORDER

(✓) The motion of Appellant for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 17, as amended January 22, 1979.

( ) The motion of appellant for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including May 30, 1980, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

* * *

/s/ THOMAS GIBBS, JR.
UNITED STATES CIRCUIT
JUDGE

Supreme Court, U. S.
FILED
SEP 11 1980
MICHAEL RODAK, JR., CLERK

No. 79-2071

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRED C. SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 2

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-2071

FRED C. SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that (1) no proper foundation was established for admission of tape recordings of his conversations with a government informant, (2) he was improperly denied a month-long continuance to enable his expert witness to examine the notes of a government expert witness, (3) one of the jurors should have been dismissed for medical disability, and (4) the evidence was insufficient to prove two counts of the indictment.

1. Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on four counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1), and on two counts of using a communication facility in causing and facilitating the distribution of cocaine, in violation of 21 U.S.C.

843(b).[1] He received concurrent sentences of six years' imprisonment to be followed by three years' special parole on each of the cocaine distribution counts and four years' imprisonment on each of the communication facility counts, to run concurrently with each other and with the sentences imposed on the cocaine distribution counts (Pet. App. 2a). The court of appeals affirmed per curiam without opinion (Pet. App. 3a).[2]

The evidence adduced at trial showed that Alan Dewey, an informant acting in cooperation with officials of the Drug Enforcement Agency and the local sheriff's office (Tr. 36-38, 81, 89-90), made monitored purchases of cocaine from petitioner on March 7, 1979, March 9, 1979, and twice on April 2, 1979 (Tr. 37-39, 47-50, 52, 56-57, 59-60, 95-99, 124-125, 127-130, 159-160, 165-169, 192-193). The purchases were arranged by telephone calls that Dewey made to petitioner. Some of the calls were made from Dewey's home or the DEA office (Tr. 42-43, 45, 118, 160-163, 195), and some were made from telephone

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[1]A seventh count, charging a violation of 18 U.S.C. 922(h) and (i), was severed prior to trial (Pet. 4; Tr. 35).

[2]The petition for a writ of certiorari is out of time. Under Rule 22.2 of the Rules of this Court in effect on the date judgment was entered in this case, the petition for a writ of certiorari was due for filing within 30 days of the entry of judgment. The court of appeals entered an order denying a petition for rehearing on April 30, 1980 (Pet. App. 4a). Accordingly, the petition for a writ of certiorari was due for filing on May 30, 1980, but was not filed until June 28, 1980. Contrary to petitioner's apparent assumption (Pet. 2), the date of the issuance of a mandate has nothing to do with the time for filing a petition for a writ of certiorari. See R. Stern & E. Gressman, *Supreme Court Practice* 395-396 (5th ed. 1978). (In any event, it appears that petitioner's motion for a stay of the issuance of the mandate was denied on May 19, 1980 (Pet. App. 5a-6a).)

booths (Tr. 49, 121). The calls made from Dewey's home were heard and recorded at the sheriff's office (Tr. 43, 55, 133-135, 160-161, 174-177) and the call from the DEA office was recorded while being made (Tr. 45). The communication facility counts were based on a telephone conversation between Dewey and petitioner on March 8, 1979, in which the March 9 purchase was arranged (Tr. 42-43, 160-163, 316), and two telephone conversations on April 3, 1979, in which a fifth purchase was arranged for the following day (Tr. 132-133, 137-140, 174-177, 317). The latter purchase was aborted by petitioner's arrest (Tr. 64-65, 213, 217).

2. During trial, the government offered into evidence and played for the jury tape recordings of the March 8 telephone conversation, upon which the first communication facility count was based (Tr. 106-108), a March 9 telephone conversation leading to the cocaine purchase on that date (Tr. 119-124), and the two April 3 telephone conversations, upon which the second communication facility count was based (Tr. 137, 139-140). Contrary to petitioner's contention, an adequate foundation was established for the admission into evidence and the playing to the jury of each of the four recordings.

DEA Agent Molyneaux testified that the March 8 call was made from Dewey's home on a three-party telephone line and that he listened while the conversation took place and was simultaneously recorded (Tr. 43). Molyneaux identified the recording that was offered into evidence as that which was made while the March 8 conversation took place (Tr. 44-45). With respect to the March 8 telephone call as well as the two April 3 telephone calls that were also made from Dewey's home, both Dewey and William Renton, a Jefferson Parish sheriff's office narcotics agent who had made the recordings, stated that they had listened to the recordings prior to trial and that

the recordings accurately reflected the respective conversations without alteration. Renton also testified that at the completion of the conversations he had removed a piece of plastic from the cassette tapes in order to make it impossible to erase the recordings. Renton identified the recordings that were offered into evidence as those he had made of the March 8 and April 3 conversations. On cross-examination, Dewey testified that he recognized petitioner's voice on the recordings because he had heard it every day (Tr. 104-106, 116-118, 160-163, 174-177). Molyneaux also identified the recording of the March 9 call that had been made from the DEA office and explained how it had been made (Tr. 44-45). Both Dewey and the DEA agent who had recorded the March 9 call testified that the recording that was offered into evidence was authentic (Tr. 110-113, 194-196). This testimony was adequate foundation for admission of the recordings. See *United States* v. *Knohl*, 379 F. 2d 427, 440-441 (2d Cir.), cert. denied, 389 U.S. 973 (1967); *Brandow* v. *United States*, 268 F. 2d 559, 567 (9th Cir. 1959); *Monroe* v. *United States*, 234 F. 2d 49, 54 (D.C. Cir.), cert. denied, 352 U.S. 873 (1956).

3. The government presented a DEA chemist who testified that his analysis showed the substances that petitioner had sold to Dewey were cocaine within the definition of controlled substances in Schedule II of 21 U.S.C. 812(c) (Tr. 235, 242, 244-253). Substantially in advance of trial, defense counsel had reviewed the reports of the results of the chemist's tests pursuant to the government's open file policy, and had been furnished with the reports pursuant to his motion under Fed. R. Crim. P. 16(a)(1)(D) (Tr. 288). During his testimony, the chemist referred to notes that he had made while performing his tests (Tr. 251); this was the first time that government counsel became aware of the notes.

At the conclusion of the chemist's direct testimony, the notes were furnished to petitioner and a recess was granted (Tr. 253, 256). After the recess, petitioner's chemical expert testified that he would need several days to review the notes and to make his own tests and, moreover, that he would not be available to testify again for four weeks (Tr. 261, 265, 272, 278). Petitioner's motion for a continuance of that length was denied, but at the completion of cross-examination of the government expert, a recess was declared until the next morning (Tr. 302). Copies of the notes to which the government expert had referred during his testimony were supplied to the defense for its use during the recess (Tr. 303).

There is no merit to petitioner's contention that the notes were improperly withheld by the government under Fed. R. Crim. P. 16 and therefore the trial court abused its discretion by denying the continuance as necessary rectification. In the first place, Rule 16(a)(1)(D) requires the production of the "results or reports" of tests—which were provided to petitioner. Nothing in the rule would appear to require the production of the notes used in making the reports that are produced. Moreover, petitioner's counsel was informed in advance of trial by his own expert that the latter would need the worknotes and graphs made by the government chemist (Tr. 263-265, 267), and nevertheless made no motion for production of them.[3] Any delay in production of the notes was therefore the result of lack of diligence on the part of the defense. Finally, the requested four-week continuance in the

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[3]Although there was some confusion regarding when petitioner's expert had made a specific request of defense counsel for the worknotes in the context of this case (Tr. 263-264, 267-268), he testified unequivocally that he always asked his clients the same questions, and therefore assumed that he had made such a request of petitioner's counsel (Tr. 264, 266-267).

middle of trial was unreasonable, particularly in light of the district court's finding (Tr. 289) that the situation complained of had been created by the defense's own strategy to surprise the government with a chemical defense.

4. Petitioner has made no showing that the district court abused its discretion by refusing to dismiss a juror for medical disability. The juror in question informed the court during voir dire that she suffered from rheumatoid arthritis and might not be able to serve during night sessions. When the court informed her that trial would recess each day by 5:30 p.m., she gave no further indication of an inability to serve and petitioner did not challenge her service at that time (Tr. 8-9). Petitioner moved to dismiss the juror because of illness on the second day of trial, when the juror arrived late. The court, in denying the motion, stated that the juror had expressed no reluctance to serve and had arrived late because she was under the misapprehension that the jury had been dismissed because of a hurricane that occurred on that day. At that point, since the one alternate juror had already been utilized, dismissal of the juror would have necessitated a mistrial (Tr. 304-305). Under these circumstances, the court did not abuse its discretion in refusing to dismiss the juror.

5. Petitioner's contention that the evidence was insufficient to sustain his conviction on the communication facility counts (Counts V-VI), because no felony in connection therewith was proven, is specious. Petitioner was charged in those two counts with using a communication facility in causing and facilitating the distribution of cocaine, in violation of 21 U.S.C. 843(b). By its convictions of petitioner on Counts I-IV, which charged violations of 21 U.S.C. 841(a), the jury clearly found

petitioner guilty of the distribution of cocaine. As a matter of law, the distribution of cocaine constitutes a felony, the commission or facilitation of which by the use of a communication facility is an offense under Section 843(b).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1980

DOJ-1980-09